No. 15,929

United States Court of Appeals

For the Ninth Circuit

JAMES HENRY AUDETT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the District of Idaho, Central Division.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

This is an appeal from a judgment of conviction handed down by the United States District Court for the District of Idaho, Central Division.

STATEMENT OF CASE.

An indictment was returned in the United States District Court of Idaho on January 25, 1956, against appellant herein, James Henry Audett, alleging that he had committed a bank robbery at Cottonwood, Idaho, on October 29, 1953.

Audett was arrested in November 1953, along with others named McClure, Hall, and Johnson, approxi-

mately two weeks after the alleged bank robbery. Certain items reputedly taken from the bank were found in possession of McClure (e.g., gold dust, jewelry). Audette was sent to prison at Salem, Oregon, for associating with known felons. So far as is known, no charges were then placed against McClure, Johnson or Hall.

In 1955, McClure was convicted of theft of government property at Portland, Oregon, and sentenced to two and one-half years imprisonment. In the same year, Hall was sentenced for bank robbery in North Dakota (one year), and later a longer term (reportedly fifteen years) for burglary in Vancouver, Washington.

Audett was arrested after the indictment of January 25, 1956, at Portland, Oregon, taken to Idaho, remained in the Caldwell County Jail until March and then in the Lewiston Jail until April 2, when he was arraigned before the Honorable Chas. E. Clark, Judge, District Court of Idaho, with Dean E. Miller, Esquire, U. S. Commissioner for the District of Idaho, as his attorney.

Trial was held on April 9 and 10, 1956. Sole testimony as to the robbery, and purported activity of Audett in connection therewith, was by Hall and McClure, purported accomplices. No witnesses for the defense were introduced.

Audett was found guilty, sentenced to twenty years on one count, ten on the other (concurrent), and immediately flown to Alcatraz. Hall, who was brought

from Washington State Reformatory for the trial under an agreement that he would be immune from process and arrest while in Idaho (transcript page 19, lines 7-10), pled guilty to bank robbery and received a sentence of one hour in the custody of the marshal. McClure also pleaded guilty, and was sentenced to serve six months concurrent with theft sentence he was then serving.

Audett filed a notice of appeal, and an election not to serve pending appeal. The District Court of Idaho denied election not to serve (Tr. pp. 24-28) and also denied application to proceed *in forma pauperis* (Tr. pp. 31-32). This appeal is now before this Court. (The above facts are as reported by appellant, who is currently incarcerated at Alcatraz.)

SUMMARY OF ARGUMENT.

Appellant contends:

1. That he was not accorded a fair trial within the meaning of the due process clause of the Constitution of the United States, Amendment 5, in that a United States Commission for the District of Idaho was allowed by the Court to act as counsel for appellant.

2. That he was, in fact, denied the "right to counsel" guaranteed by the Sixth Amendment to the United States Constitution.

3. That he was convicted solely on the uncorroborated testimony of purported accomplices, after preju-

dicial error had been committed by the trial Court in its instructions relative to accomplices.

4. That there is insufficient evidence to support the judgment, and

5. That the Court committed prejudicial error in that it refused to grant the motion for judgment of acquittal.

ARGUMENT.

I.

APPELLANT WAS DENIED DUE PROCESS OF THE LAW IN BEING REPRESENTED BY A UNITED STATES COMMISSIONER.

The Fifth Amendment to the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The phrase "due process of law" has consistently been applied to assure that defendants in criminal cases be afforded all the rights to which they are entitled under the Constitution. For, as stated in *United States v. Hamilton,* 97 Fed. Supp. 123 at 128:

> "The Bill of Rights secures liberties which are sacred and inviolable. An uncorrected transgression of its commands or prohibitions ought not be weighed and measured by the degree of force with which it may impinge upon a given situation. If the violation is clear, the remedy should be applied. Otherwise, the privileges and immunities secured by the Bill of Rights may be gradually eroded by the judicial improvisations that would inevitably flow from a system whereby the right is gauged according to the person involved or the circumstances of the particular case."

This clause supplements the specific procedural guarantees enumerated in the Sixth Amendment (discussed in Section II hereof) for persons accused of crime.

The record is clear that appellant was deprived of due process here, in being represented by a United States Commissioner. The transcript of the record, pages 8 and 9, contains a letter sent by appellant's purported counsel, before the trial, to the prosecuting attorney, indicating the position of Mr. Miller as such Commissioner. Could Mr. Miller therefore represent Audett?

The provisions of Part III, Title 28, Chapters 41 et seq., U.S.C., make it abundantly clear that United States Commissioners are prohibited from engaging in the practice of law in any Court of the United States.

Section 607, Title 28, *United States Code:*

> "An officer or employee of the Administrative Office shall not engage directly or indirectly in

the practice of law in any court of the United States."

A United States Commissioner is an "officer or employee" of the Administrative Office of the United States Courts. Part III of Title 28 is entitled *"Court Officers and Employees."*

While some distinction seems to be made between the officers and employees of the Administrative Office and the clerks and other clerical and administrative personnel of the Courts, it does not appear from reading Part III of Title 28 that such a distinction is intended (see, however, Section 955, Title 28 U.S.C.).

In Section 604, Title 28, U.S.C., the duties of the director are defined. Among these duties are:

"(1) Supervise all administrative matters . . ." (28 U.S.C. 604 (a) (1))

"(2) Determine and pay necessary office expenses of courts, judges, and those court officials whose expenses are by law allowable, *and the lawful fees of United States Commissioners"* (28 U.S.C. 604 (a) (6))

"(3) Purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies needed for the maintenance and operation of the courts and the Administrative Office *and the offices of the United States Commissioners"* (28 U.S.C. 604 (a) (9))

The duties of a United States Commissioner are such that no distinction should be drawn allowing the

Commissioner to practice law in a Court of the United States while clerks, deputy clerks, and their assistants (28 U.S.C. 955) and United States Marshals (28 U.S.C. 556) are prohibited from doing so. Commissioners, as officers of the United States Courts should not be allowed to practice in these Courts in an obviously incompatible capacity.

Appellant concedes that Part III of Title 28 contemplates that United States Commissioners may engage in the practice of law (28 U.S.C. 633, as amended August 13, 1954). It should be noted, however, that clerks, deputy clerks, their assistants, and United States Marshals are not prohibited from engaging in the practice of law in any Court other than a Court of the United States. It is submitted that Section 633 contemplates that the Commissioners may engage in practice in the state and local Courts.

The United States was prosecuting the appellant for the alleged commission of a crime against its laws. Should an agent or officer of the United States be allowed to defend the person his employer is prosecuting?

We respectfully submit that Congress intended to prohibit the practice of law by United States Commissioners in the Courts of the United States.

It will be contended that Audett "waived" his rights in this matter by his certification on the letter of March 27, 1956, and statement to that effect in open Court (Tr. p. 37). It is submitted that it is not within the power of an accused or his attorney to waive such rights.

II.

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL.

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

It should be noted initially that the phrase "Assistance of Counsel" is the only *capitalized* right included in the amendment (see Library of Congress Edition of Constitution, published per Senate Joint Resolution No. 69, June 17, 1947); a right which the framers of the Constitution considered paramount and necessary to our system of justice.

Through the years, the Supreme Court of the United States has progressively added substance to the right by requiring that the "Assistance of Counsel" be effective. *Glasser v. U.S.,* 315 U.S. 60; *United States ex rel. Mitchell v. Thompson,* 56 F. Supp. 683, 686-87.

Decisions of the Supreme Court on the effect of violation of the right to effective counsel have, in recent years, been precise in construing the guarantee,

to impose on the trial Court an absolute requirement that an accused be secured the elements of the right.

> "The right to the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."
>
> *Glasser v. U.S.,* 315 U.S. 60.

From the opinion above quoted, and those hereinafter cited, it would seem that to prove his contention of denial of his constitutional right to counsel, appellant need but to reiterate that

a. His attorney of record was in fact United States Commissioner, representing an irreconcilable conflicting interest, and

b. No defense on behalf of appellant was made by said attorney.

What does the record show with regard to these two points?

In Section I (supra) we have pointed out that Mr. Miller, the attorney of record, was also United States Commissioner. The same facts and authorities cited therein, indicating violation of due process, would apply as to the Sixth Amendment. For, as pointed out in a citation from *Johnson v. Zerbst,* 304 U.S. 458, the Supreme Court in *Glasser v. U.S.,* 315 U.S. 60, holds:

> "Even as we have held that the right to the 'Assistance of Counsel' is so fundamental that the denial by a State Court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that Court to make an ef-

> fective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to the denial of due process of law contrary to the Fourteenth Amendment *Powell v. Alabama,* 287 U.S. 45, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and simultaneously represent conflicting interest. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired".

The statements of the Supreme Court in *Johnson v. Zerbst,* supra, are pertinent, where at page 463 the Court says:

> "The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. This is one of the safeguards of the Sixth Amendment, being necessary to insure fundamental human rights of life and liberty * * *
>
> "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done' * * * The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights and that guaranty would be nullified by the determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution."

It might be contended that the *Glasser* case pertains only to circumstances wherein the defendant had

counsel appointed by the Court. This argument, however, was effectively quashed by the Ninth Circuit Court in the case of *Hayman v. U.S.,* 187 F.2d 456, where Denman, Chief Judge, avers at page 460:

> "In the Glasser case, supra, unlike the present case, the trial judge appointed the attorney representing the adverse interests. However, the Sixth Amendment does not restrict the right to a deprivation by the judge * * * If, unknown to the court, the accused counsel were bribed by the enemy of the accused to throw his case, and the accused learned of it after conviction, the fact that the court had nothing to do with the wrong done, does not deprive him of his right to the writ."

In the *Glasser, Johnson* and *Hayman* cases, supra, the Courts all found a violation of fundamental rights when an attorney represents conflicting interests.

What other comment can be made on the issue of conflicting interests?

The Court's attention is again called to the letter of March 27, 1956 addressed to the United States Attorney, District of Idaho (Tr. pp. 8 and 9).

Here we see an attorney who is theoretically going to represent an accused, actually asking the opinion of the prosecutor as to the ethics of his position. We see that there had been a discussion with the United States Attorney, as to whether Mr. Miller should resign as U.S. Commissioner. And obviously, agreement had been reached before the letter was written.

Can it honestly be contended by anyone that there was no major conflict of interest here?

As to our first point, then, it must be concluded that the law is clear; his attorney represented diametrically opposed and conflicting interests and appellant was thus denied "Assistance of Counsel".

The meaning of the words "right to counsel" has been extended by the Courts so that now the right includes that to have "effective" counsel. As stated by the Court in *United States v. Wights,* 176 F. 2d 376, which case involved an appeal from a denial of a motion to vacate sentence, where the petitioner had contended as here that he did not receive the effective services of counsel contemplated by the constitutional guaranties of the Fifth and Sixth Amendments, at page 378:

> "There can be no quarrel with the proposition that the right to counsel means the right to the conscientious services of competent counsel. (Citing *Von Moltke v. Gillies,* 332 U. S. 708; *Willis v. Hunter,* 166 F.2d 721; *Power v. Alabama,* 287 U. S. 45; *Johnson v. Zerbst,* 304 U. S. 458; *Glasser v. U. S.,* 350 U.S. 60)".

Again, in *Hayman v. U. S.* (supra):

> "It is erroneous to contend that the Court of Appeals for the District of Columbia holds that it is only where the court appoints his attorney that the accused may claim that he has not enjoyed the effective assistance of counsel. On the contrary in *Jones v. Huff,* 80 U. S. App., D.C. 254, that court reversed the dismissal of an application for a writ of habeas corpus which al-

> leged that the attorney chosen by the convicted man had so conducted the trial that it became 'a farce and a mockery of justice'. It was held that the accused was not given the effective representation required for the fair trial of the Fifth Amendment within the broad principles established in the Glasser case and in Mr. Justice Frankler's opinion in Malinski v. People of the State of New York, 324 U. S. 41".

It is easy, of course, for subsequent counsel in the ordinary case to frame better questions; for military strategists to demonstrate how lost battles might have been won. But such is not the need here.

A page by page, witness by witness perusal of the record will show, without question, that there simply was *no* representation. We have here an attempt to convict a man on the uncorroborated testimony of purported accomplices. Is there any pattern at all to the questions of counsel? Is there any attempt to bring out and emphasize conflicting testimony?

Is there a searching cross-examination of the young convicts who are testifying (one under an agreement, which must have been known to counsel as it was a matter of record, that he would not be subject to process or arrest) against appellant? Is there any positive approach pointing out the inherent improbabilities in the so-called accomplices' testimony?

And finally, was any defense made? Were any witnesses for defendant examined? The record shows that immediately after the Government rested (p. 131), Mr. Miller did the same. Yet appellant states

that he repeatedly asked Mr. Miller to subpoena certain witnesses who could testify as to appellant's whereabouts on the day of the alleged bank robbery. (This is outside the record.)

This last failure, by itself, it is submitted, would be sufficient indication of the ineffectiveness of counsel. When tied to the rest of the record, little more need be said. For as this Court has pointed out in *Dusseldorf v. Teets, Warden,* No. 13,337, June 30, 1953 (later withdrawn for technical reasons):

> "At the trial his attorney did not put one witness on the stand for Dusseldorf and he did not even let Dusseldorf take the stand . . . his attorney . . . replied he would not let Dusseldorf take the stand even after Dusseldorf told him his confession was false and could be proved false and that a co-defendant's confession was also false so far as it related to Dusseldorf. The result was no evidence at all was presented by his attorney in Dusseldorf's defense." (page 2.)

And at page 5 the Court repeats a statement made in a California Supreme Court hearing:

> "Again this lack of counsel or representation by counsel so inadequate as to amount to no counsel at all (*Powell v. Alabama,* 387 U.S. 45) are not matters dehors the record. Lack of counsel would be apparent to the most casual observer thumbing through the record."
>
> "We hold that these facts present a justiciable question of a violation of the due process clause of the Fourteenth Amendment respecting the performance of the court's obligation to make a

> full inquiry as to Dusseldorf's representation at the trial by a counsel of his choice within *Glasser v. United States,* 315 U.S. 60; *Johnson v. Zerbst,* 304 U.S. 458." (page 4.)

The facts herein are extraordinarily similar to those of the *Dusseldorf* case. Audett is a man who is of Umatilla Indian background, with little formal education; his counsel a United States Commissioner. No witnesses for the defense were presented. Appellant was not placed on the stand. Cross-examination was missing, minute or mutilated with no pattern or form. Even "the most casual observer thumbing through the record" can see that there was a lack of effective assistance of counsel such as to make the trial a sham and mockery of justice.

And what additional indications are there of both a conflict of interest, and failure to act as effective counsel? A notice of appeal was filed by Mr. Miller on April 18, 1956. The appellant was taken to Alcatraz immediately after the trial. He sought, by letter to the clerk (Tr. p. 22) to elect not to serve pending appeal. Counsel did not appear for him on such motion. Nor did counsel make any attempt to proceed with his appeal. For within five days (and it must be assumed without personal discussion, for appellant was in Alcatraz), Mr. Miller on April 23 filed notice of withdrawal as attorney for Audett.

The Constitutional safeguard of "assistance of counsel" would indeed, as previously pointed out in *U. S. v. Hamilton,* supra, be "eroded away", if the conflicts here shown were allowed to stand unchallenged.

III.

THE COURT COMMITTED PREJUDICIAL ERROR IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL.

At the close of the prosecution's case defendant's counsel moved the Court for a judgment of acquittal on the ground that the defendant should not be convicted solely upon the uncorroborated testimony of the accomplices (132).* The motion was denied (132). It is appellant's contention that the Court's denial of the motion for acquittal was erroneous.

A. Appellant was convicted on the uncorroborated testimony of alleged accomplices.

Witnesses Hall and McClure, by their own admissions, committed the burglary of the First National Bank of Cottonwood, Cottonwood, Idaho. They were both indicted, they both pleaded guilty, they were both convicted, and they were both waiting to be sentenced at the time that they testified in *U.S. v. Audett* (59, 90). Both witnesses testified that Audett conceived the plan of the burglary, solicited them to accompany him, and directed them in the accomplishment of the crime. But for the testimony of Hall and McClure, there was no other evidence to connect Audett to the crime.

It is naive to suppose that Hall and McClure did not have some assurance that their testimony against Audett would reduce the sentences which they would receive after Audett's trial. (And the facts as reported by appellant would bear this out. Hall received one

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*References are to pages of the printed Transcript of Record.

hour in custody of the Marshal; McClure six months, concurrent with another sentence.)

The federal rule has been that a man may be convicted on the uncorroborated testimony of an accomplice. This has been the rule of law in Federal Courts in spite of the recognition in nearly every case how untrustworthy such testimony is.

Many states, recognizing the fact which is stated in nearly every case on the subject, federal or state, that such testimony is peculiarly unreliable, have passed statutes which provide that a man may not be convicted of a crime on the uncorroborated testimony of an accomplice.

Alabama:
Alabama Code, 1940, Tit. 15, Sec. 307.

Arizona:
Arizona Code Ann., 1939, Sec. 44-1819.

Arkansas:
Arkansas Stats. Ann., 1947, Sec. 43-2116.

California:
California Penal Code, Sec. 1111.

Georgia:
Georgia Code, Sec. 38-121.

Idaho:
Idaho Code, Sec. 18-601.

Iowa:
Iowa Code Ann., Sec. 782.5.

Kentucky:
Kentucky Code of Crim. Proc., Sec. 241.

Minnesota:
Minnesota Stats. Ann., Sec. 634.04.

Montana:
Montana Pen. Code, 1935, Sec. 11988.

New York:
New York Code of Crim. Proc., Sec. 399.

Nevada:
Nevada Comp. Laws 4330.

Oklahoma:
Oklahoma Stats., 1941, Sec. 22-742.

Oregon:
Oregon Code, 1930, Sec. 13-935.

South Dakota:
South Dakota Code, 24.0204.

Texas:
Texas Code of Crim. Proc., 1925, Art. 718.

Utah:
Utah Code, 1943, 103-11-1.

Some states, *even in the absence of statute,* have refused to allow convictions on the uncorroborated testimony of an alleged accomplice.

Coleman v. State (Md.), 121 Atl. 2d 254;
Witham v. State (Tenn.), 232 So.W. 2d 3.

The reason for the rule is well expressed in *Watson v. State,* 117 Atl. 2d 549, 552:

"It is a firmly established rule in this State that a person accused of a crime may not be convicted on the uncorroborated testimony of an accomplice. (Citations.) The reason for the rule

requiring the testimony of an accomplice to be corroborated is that it is the testimony of a person admittedly contaminated with guilt, who admits his participation in the crime for which he particularly blames the defendant, and it should be regarded with great suspicion and caution, because otherwise the life or liberty of an innocent person might be taken away by a witness who makes the accusation either to gratify his malice or to shield himself from punishment, or in the hope of receiving clemency by turning State's evidence. (Citations.)"

The United States Constitution guarantees a fair trial to a man accused of crime. A fair trial cannot be one where a criminal, who can expect to gain a lighter sentence or immunity if he names another as co-conspirator, is permitted to convict a man by his testimony alone. Without the requirement of corroboration there can be no protection for the innocent man from criminals who need a scapegoat. Even an honest and upright man succumbs occasionally to the temptation to sacrifice another to help himself. There is no justice in a rule of law which offers a criminal freedom or a reduced sentence in exchange for merely a little perjury.

B. The testimony of the alleged accomplices supports appellant's theory that Hall and McClure falsely implicated appellant in order to obtain light sentences for themselves.

The witnesses Hall and McClure agree very closely about how the crime was committed—they should, admittedly they did it—but when each tells how Audett participated, their stories are inconsistent.

Briefly, the crime was committed by driving from Portland to Cottonwood in McClure's car, parking the car a few blocks from the bank on a dark street, Hall climbing on top of the bank, breaking into the skylight, letting himself through the skylight with a rope, opening a door to let in his accomplice with the burglary tools (allegedly two accomplices), the criminals cutting through the top of the vault, rifling the safety deposit boxes, leaving through the outside door and making a getaway.

The following is the account of Audett's participation in the crime according to the testimony of Hall and McClure:

The first meeting of Hall, McClure and Audett:

Hall	McClure
They went to Audett's house and all three drove around in a car for a couple hours and discussed burglaries (42, 62).	They met at the Triple X Restaurant on 82nd Avenue (107).

The breaking through the skylight of the bank:

Hall	McClure
He and McClure got on the roof of the bank while Audett waited on the ground by some old machinery; they broke the skylight and Hall let himself down on a rope, McClure holding his hand (47, 48).	Hall broke into the skylight while McClure waited with Audett on the ground (92).

The breaking into the vault:

Hall	McClure
McClure and Audett took the bricks out of the top of the vault and Audett and McClure went into the vault first (50).	Hall and McClure took the bricks out of the top of the vault. Audett and Hall were first into vault while McClure was a lookout (93).

Audett is pictured by both as standing in the background, giving advice and directions. Any physical activity in the burglary attributed to Audett by the witnesses makes them tell conflicting stories. The physical activity in burglarizing the bank required only two people, not three. Having accomplished the crime and been apprehended several weeks later with the identifiable loot (although not indicted for over two years), it was easy to bring in another fictitious accomplice who has all the ideas, who stands in the background, but who never does any of the physical acts essential to accomplish the crime. Although this fictitious accomplice brought his tools, they weren't used in the crime [McClure identified Exhibits 2, 5, 10, 8 and 1 as his tools (88, 29); Hall identified the tools which had been purchased by him and testified evasively that Exhibits 5, 8 and 10 looked like tools which Audett had brought (57-58)]. This fictitious accomplice, for some reason unexplained, received his one-third share of the non-identifiable, fungible loot but did not receive any of the loot which was traced to the burglary (e.g. the jewelry, the gold dust and gold nuggets in little glass vials) and which was found in the possession of Hall and McClure (87).

IV.

APPELLANT WAS DENIED A FAIR TRIAL IN THAT:

A. THE COURT COMMITTED PREJUDICIAL ERROR IN INSTRUCTING THE JURY THAT IT COULD CONVICT THE DEFENDANT ON THE TESTIMONY OF ACCOMPLICES ALONE (139).

B. THERE IS NOT SUFFICIENT EVIDENCE TO SUSTAIN THE JUDGMENT WITHOUT THE UNCORROBORATED TESTIMONY OF THE ACCOMPLICES.

For reasons above stated (Section III) the constitutional requirement of a fair trial demands that the conviction be reversed on the ground that a man cannot be convicted of a crime solely upon the uncorroborated testimony of accomplices. This is a classic case of such conviction, for there is no evidence of any kind to connect appellant with the crime herein except the unsupported and uncorroborated testimony of purported accomplices.

It is respectfully submitted that the judgment herein should be reversed.

Dated, San Francisco, California,
November 26, 1958.

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